IN THE

Supreme Court of the United States

No. 77-1335

INTERSTATE PROPERTIES and
I. P. CONSTRUCTION CORP.,

Petitioners,

vs.

GARY BECKER,

Respondent,

INTERSTATE CONSTRUCTION CORP., WINDSOR CONTRACTING CORP., LAWRENCE CORP., DIAMOND REO, JAMESWAY COMPANY, WILLARD EDWARDS, A.I.A. RAYMOND KEYES ENGINEERS, and SAUL SILVERMAN,

Defendants,

WOOD PINE CONSTRUCTORS, INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEREDITH, MEREDITH & CHASE,
Attorneys for Respondent,
Gary Becker,
109 South Warren Street,
Trenton, New Jersey 08608
(609) 599-9587

EDWARD B. MEREDITH
On the Brief

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REASONS FOR DENYING WRIT

Introduction

The decision of the majority below was based upon unanimous dicta of the New Jersey Supreme Court in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, 30 N.J. 425, 153 A.2d 321 (S. Ct. 1959). As confirmed in Point I, *infra*, every decision of the Supreme Court in

the 19 years subsequent to the *Majestic* decision has served to confirm the viability of that dicta. Suffice it to state, in such circumstances, that this Court does not ". . . ordinarily review the holding of the Court of Appeals on a matter of State law . . .". *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288, 297 (1967).

Point II of petitioner's argument is essentially an *argumentum ad hominen* and clearly, in light of the existence of *Majestic Realty Associates, Inc. v. Toti Contracting Co., supra*, proceeds from a wrong premise, *i.e.*,

> ". . . The circuit courts . . . tend to defer to the District Court where there is no state precedent . . ." (P.C. pg. 21)

Simply stated, precedent abounds in New Jersey.

Point I

The decision below accurately reflects existing New Jersey law.

The basic thrust of the Petitioner's argument is that in the absence of any case directly in point, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 barred the District Court from fashioning any remedy which would fasten liability on the Defendants. Clearly, that case cannot be read to bar remedy simply because an identical case happens not to have arisen in the forum State.

One of the evils which the *Erie* decision sought to right was the favored suitor status of non-resident parties at the expense of resident parties which had resulted from the application of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865. The basic holding was the law of the forum should be applied.

This Court has recognized that the law of the forum not always provide an identical factual pattern or specific holding for cases which may alternatively be brought at the Federal level.

In *Angel v. Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L.Ed. 835, Justice Frankfurter noted that:

> "For purposes of diversity jurisdiction, a federal court is 'in effect, only another court of the State' . . .
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> • • •
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> "The essence of diversity jurisdiction is that a Federal Court enforces State law and State policy . . . What is most important, diversity jurisdiction must follow State law and policy. . . Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.
>
> ". . . *Erie R.R. Co. v. Tompkins* . . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective state courts or were barred by defense controlling in the state courts."

The type of inquiry which must be made to divine State law was outlined in *Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 100 L.Ed. 100, 76 S. Ct. 273 wherein the Court commented that in respect to a particular Vermont holding,

> ". . . there is no later authority from the Vermont courts, that no fracture in the rules announced in those cases has appeared in subsequent rulings or dicta, and that no legislative movement is underway in Vermont to change the result of those cases. . . . As we have indicated, there appears to be no confusion in Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont Judges. . ."

In his concurring opinion, Justice Frankfurter observed that

> "As long as there is diversity jurisdiction, 'estimates' are necessarily often all the federal courts can make in ascertaining what the state court would rule to be its law. . ."
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> • • •
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> ". . . Law does change with times and circumstances and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports, or otherwise written."

Erie R.R. Co. v. Tompkins, supra and its progeny thus have a dual thrust: a plaintiff is not entitled to greater protection than resident parties but, at the same time, he is certainly not entitled to no less.

Majestic Realty Associates, Inc. v. Toti Contracting Co., supra, was decided in 1959. The dicta in that case, wholly applicable here, interestingly served to forecast the undeniable and unswerving path which the New Jersey Supreme Court would thereafter take. The very following year, the important case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (S. Ct. 1960) was decided and the theory of distributive justice has guided the Supreme Court and the lower courts in New Jersey without variation since that time. A nonexhaustive list of subsequent decisions may be found in *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J. Super. 328, 340 A.2d 687 (S. Ct. L.D. 1975) as follows:

> "Since the landmark case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), New Jersey has been in the forefront of jurisdictions extending protection to consumers by imposing strict liability in tort. The doctrine expressly has been extended to the manufacturer and/or seller of automobiles, Henningsen, supra; Scanlon v. Gen. Motors Corp., supra, 65 N.J. 582, 326 A.2d 673; Moraca v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599 (1975); motorcycles, Sabloff v. Yamaha Motor Co., Ltd. 113 N.J. Super. 279, 273 A.2d 606 (App. Div. 1971), aff'd 59 N.J. 365, 283 A.2d 321 (1971); carpeting, Santor v. A. & M. Karagheusin, Inc., supra, 44 N.J. 52, 207 A.2d 305; grinding discs, Jakubowski v. Minn. Mining & Manufacturing, 80 N.J. Super. 184, 193 A.2d 275 (App. Div. 1963), rev'd on other grounds, 42 N.J. 177, 199 A.2d 828 (1964); mass-produced houses, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 413 (1965); cafeteria food, Sofman v. Denham Food Service, Inc., supra, 37 N.J. 304, 181 A.2d 168; a power punch press, Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 290 A.2d 286 (1972); carbonated beverage bottles, Corbin v. Camden Coca-Cola Bottling Co., supra, 60 N.J. 425, 290 A.2d 441; permanent hair wave solution, Newmark v. Gimbel's Inc., supra, 54 N.J. 585, 258 A.2d 697; and water meters, Rosenau v. New Brunswick, etc., 51 N.J. 130, 238 A.2d 169 (1968); it also applies to lessors of rented motor vehicles and trailers, Cintrone v. Hertz Truck Leasing, etc., 45 N.J. 434, 212 A.2d 769 (1965); Ettin v. Ava Truck Leasing, Inc., 53 N.J. 483, 251 A.2d 278 (1969). Recovery is based on considerations of policy rather than actionable conduct by the defendant."

In *Schipper v. Levitt & Sons, Inc., supra,* the Court cautioned that:

> "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . .
>
> • • •

> "The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation."

Lest doubt remain, the courts specifically held in *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (S. Ct. 1968).

> "We see no good reason why the negligence principles adopted in *Schipper* with respect to mass housing developers . . . should not be applied to all builders and contractors and we now so hold."

The law aside, the holding below actually does no more than hold the general contractor to the framework which his contract with subcontractors laid out. Essentially, the contract required sub-contractors to have insurance, as well as sub-contractors, in stated amounts. The fact that the job site was wholly unpoliced by the general contractor or his agents in respect to this "required" insurance is itself quite probably negligence since no one other than persons in and about the job site could have been beneficiaries of the insurance requirement. Had the contractual framework obtained, and the general contractor most probably intended it should, full coverage would have, in any event, existed.

In the legislative field, there has been enacted both a Construction Safety Act, *N.J.S.A.* 34:15-166, *et seq.*, and and a Workers Health and Safety Act, *N.J.S.A.* 34:6A-1. As here pertinent, the ultimate responsibility for enforcing the safety provisions of the Code is in the general contractor who must, in effect, police the job site so that the safety provisions are carried out. N.J.A.C. 12:180-3.15.1.

In sum, the decision below does no more than carry out a policy of state law announced some 19 years ago and confirmed in every reported decision since. At the practical level, the decision does no more than carry out the scheme which the contractor himself undertook to create, via the contract with subcontractors.

Point II

The majority below properly set aside the narrow and incorrect decision of the District Judge.

The District Judge clearly conceived that his function was a limited one in the premises and that unless he could "distinctly glean from New Jersey law and policy," the particular course pointed out by the unanimous decision in *Majestic Realty Associates, Inc. v. Toti Contracting Co.*, *supra*, then he would be able to fashion any remedy at all (P.C. pg. 9a).

Such, of course, is not the function of a Federal Judge called upon to divine state law. Rather, the court's function is the broader one of predicting what a New Jersey court would do if confronted with similar facts where there is no decision "squarely on point" (P.C. pg. 21a). See particularly note 5, at P.D., pg. 21a.

While the Petitioner rather grandly asserts that "the Third Circuit apparently [sic] is the only judicial circuit which undertakes an independent review of District Court decisions on issues of state law," the cosmetic citations which follow clearly do not support this proposition.

Where, as here, there is a precise and unanimous statement by the Supreme Court indicating what it would do in hypothetical premises, it would seem clear that only the bravest of state trial Judges would simply ignore that decision and proceed in a direction opposite from that

pointed out by the State Supreme Court. Particularly is this so when, as noted, all subsequent decisions have reaffirmed the doctrine of distributive justice as one of policy in New Jersey.

One observation would here be appropriate. Petitioner's Memorandum seems, for some reason, to differentiate between plaintiffs who are "uncompensated" and plaintiffs who are "compensated." Reference here is to workmen's compensation. Apparently overlooked is the fact that the Workmen's Compensation Statute itself recognizes a right in the injured workman to bring a so-called third party suit and a significant number of the products liability cases which have arisen in New Jersey directly involve workmen who received workmen's compensation and then brought suit against the manufacturer or distributor of a machine, vehicle or other agency of harm. See *N.J.S.A.* 34:15-40 and citations therein.

Given clear guidance by the Supreme Court 19 years ago, it would not be appropriate to respond to the Petitioner's *ad hominem* plea, as it appears dominantly in the second point.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari inasmuch as decisional law in the State of New Jersey is both clear and wholly supportive of the decision of the majority below.

Respectfully submitted,

MEREDITH, MEREDITH & CHASE,
Attorneys for Respondent,
Gary R. Becker

By: /s/ Edward B. Meredith
EDWARD B. MEREDITH